(3)

Supreme Court, U.S.
FILED
AUG 07 1994
OFFICE OF THE CLERK

No. 94-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TAP ELECTRICAL CONTRACTING SERVICE, INC.,

Petitioner,

vs.

JOHN E. SWEENEY, as Commissioner of Labor of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JAMES S. FRANK, ESQ.
Counsel of Record
DAVID E. PRAGER, ESQ.
PHILLIPS NIZER BENJAMIN KRIM & BALLON LLP
666 Fifth Avenue
New York, New York 10103-0084
(212) 977-9700

Attorneys for Petitioner TAP Electrical Contracting Service, Inc.

BEST AVAILABLE COPY

53 pp

TABLE OF CONTENTS

	PAGE
PETITIONER'S REPLY BRIEF	1
I. TAP HAS PROPERLY PRESERVED FOR REVIEW ITS ERISA PREEMPTION CLAIM HEREIN	5
A. TAP Asserted ERISA Preemption in its Initial Judicial Challenge as to the Entirety of the Commissioner's Order	6
B. TAP Asserted and Preserved the Specific Argument Herein as to ERISA Preemption of Section 220's Apprenticeship Provisions.	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Pena, 118 S. Ct. 2097 (1995)	3
American Sugar Refining Co. v. Waterfront Comm., 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982)	9
Carlson v. Green, 446 U.S. 14 (1980)	10n.15
Dillingham Constr. N.A. v. Sonoma County, 57 F.3d 712 (9th Cir. 1995)	3
E.E.O.C. v. Joint Apprenticeship Board of the Elec. Indus., 828 F.Supp. 264 (S.D.N.Y. 1993)	1n.4
General Elec. Co. v. New York State Dep't of Labor, 936 F.2d 1448 (2d Cir. 1991)	4n.9
Gilbert v. Burlington Indus., Inc., 765 F.2d 320, 329 (2d. Cir. 1985), *aff'd* 477 U.S. 901 (1986)	7n.13
Matter of Monarch Elec. Contracting Corp.v. Roberts, 70 N.Y.2d 91, 517 N.Y.S.2d 711 (1987)	1n.5, 2
National Elevator Indus., Inc. v. Calhoon 957 F.2d 1555, 1559 (10th Cir.), *cert. denied,* 113 S.Ct. 406 (1992)	4
People v. McDonald, 68 N.Y.2d 1, 505 N.Y.S.2d 824 (1986)	9
Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246, 502 N.Y.S.2d 125 (1986)	9
Street v. New York, 394 U.S. 576 (1969)	5

Cases	Page
TAP Elec. Contracting Service, Inc. v. Hartnett, 156 A.D.2d 612, 549 N.Y.S.2d 118 (2d Dep't 1989)	7
TAP Elec. Contracting Service, Inc. v. Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 988 (1990)	8
TAP Elec. Contracting Service, Inc. v. Hartnett, 207 A.D.2d 547, 616 N.Y.S.2d 988 (2d Dep't 1991)	9
TAP Elec. Contracting Service, Inc. v. Hartnett, 1995 N.Y. LEXIS 310 (N.Y. Feb. 21, 1995)	5
TAP Elec. Contracting Service, Inc. v. Hartnett, et al., No. 90-0083 (E.D.N.Y. June 25, 1990), *aff'd*, Nos. 90-7645 and 91-0201 (2d Cir. Jan. 16, 1992)	5n.11
Taylor v. Illinois, 484 U.S. 400 (1988)	8
Yee v. Escondido, 503 U.S. 519 (1992)	7
Youakim v. Miller, 425 U.S. 231 (1976)	10n.15
STATUTES	
29 U.S.C. § 1001 *et seq.*	1n.2
29 U.S.C. § 1002(1)	2
29 U.S.C. § 1144(a) and (c)	2
N.Y. Labor Law § 220 *et seq.*	1
N.Y. Labor Law § 220(3)	3
N.Y. Labor Law § 220(5)(b)	6
REGULATIONS	
23 C.F.R. §230.107-.113	3n.7
23 C.F.R. Part 230, Subpart A, Appendix B	3n.7

PETITIONER'S REPLY BRIEF

Petitioner TAP Electrical Contracting Service, Inc. ("TAP"), in response to the opposition papers of Respondent, Commissioner of Labor of the State of New York ("Commissioner"),[1] observes that Respondent, like the New York Court of Appeals, seeks to maintain the status quo and not have this Court determine whether ERISA[2] preempts the State's Prevailing Wage Law apprenticeship provisions. Respondent's opposition rests solely on the faulty assertion that TAP has not properly "preserved" the important issues presented for this Court's review. However, from the outset of these proceedings, TAP has asserted that ERISA preempts the Commissioner's Orders against TAP in their entirety (C- *passim*[3]).

In seeking to perpetuate the State's favoring of the State-registered IBEW apprenticeship program (which was held to discriminate against minorities and women)[4] over TAP's federally-approved ERISA training plan solely on (erroneous) technical grounds, Respondent misses the essential points: (1) that the Commissioner has applied N.Y. Labor Law Section 220 ("Section 220") with the penal sanction of "debarment" in this case -- and throughout the State by virtue of the *Monarch*[5] decision, whose scope was broadened herein -- to forbid all public works contractors (on projects receiving any

---

[1] John E. Sweeney replaced John F. Hartnett as Commissioner of Labor of the State of New York ("Commissioner"), as noted in the caption

[2] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").

[3] Pursuant to Supreme Court Rules 21.1(h), Petitioner has attached as Appendix C hereto pertinent excerpts from its State Court Petition and Briefs at each stage of these proceedings, to demonstrate its preservation of the issues sought to be reviewed herein. References to these materials are denoted by (C-[page]).

[4] E.*E.O.C. v. Joint Apprenticeship Board of the Elec. Indust.*, 828 F.Supp. 264 (S.D.N.Y. 1993) ("EEOC v. JAC").The discriminatory apprenticeship program sponsored and administered by Local 3 of the International Brotherhood of Electrical Workers ("IBEW") is currently the sole "State-registered" union apprenticeship program in the electrical industry in the New York metropolitan area.

[5] *Matter of Monarch Elec. Contracting Corp. v. Roberts*, 70 N.Y.2d 91, 517 N.Y.S.2d 711 (1987)("*Monarch*").

amount of state funding) from employing "trainees" in any Federally-approved training program; and (2) that the challenged Sections of 220 impose artificial and illegal barriers to the entry of women and minorities to the electrical construction trades. By favoring State-registered apprentice programs and apprentices, and imposing sanctions on all others, the Commissioner's application of Section 220 impermissibly "affects" and "regulates" the terms of employee training programs that are ERISA plans. Such regulation is in derogation of the exclusive Federal jurisdiction to regulate ERISA training programs. 29 U.S.C. §§ 1002(1), 1144(a) and (c). Petitioner seeks review under the Supremacy Clause of the United States Constitution to halt the State's continued impermissible action which injures Federal equal employment policy, intrudes upon contractors' Federal rights, and is directly contrary to the decisions of Federal courts invalidating similar laws in California, Oklahoma, Nevada, Minnesota, and Michigan.[6]

As demonstrated in TAP's Petition, the only material difference between the Federal "training" programs "forbidden" in New York, and the State-approved "apprenticeship" programs, are the entry-level barriers contained in the IBEW program favored by the State: more onerous "education" and "experience" requirements that comprise discriminatory "barriers" to entry by minorities and women into skilled construction trades, here the electrician trades. *See Monarch*, 70 N.Y.2d at 97, 517 N.Y.S.2d at 714; *E.E.O.C. v. JAC*. To comply with Section 220, a contractor must not only abandon its participation in a Federally-approved training program on any project which is partially State-funded, but must also abandon all *individual employee-participants* enrolled in the Federal training program who are unable to meet the State-registered program's more onerous entry-level citeria for individual registration.

Respondent persists in applying these concededly "anomalous" -- and, in fact, unconstitutional -- provisions of Section 220, despite having been admonished eight years ago by the Court of Appeals in *Monarch* that the State must act to remedy

---

[6] See cases cited in TAP's May 22, 1992 Petition for a Writ of Certiorari ("Petition") at p.7, n.7, and pp. 20-29.

the (then) "unforseen" effect of Section 220's apprentice provisions that "frustrate" the "compelling" Federal policy "of reducing discrimination in the construction labor force." 70 N.Y.2d at 99, 517 N.Y.S.2d at 715. Notably, the Federal programs that are "frustrate[d]" in New York are the very forms of non-quota and non-preference-based "affirmative action" initiatives -- training and outreach -- which remain approved by this Court under *Adarand Constructors, Inc. v. Pena*, 118 S.Ct. 2097 (1995).[7]

Respondent's own "Statement of the Case," standing alone, shows facts sufficient to require preemption by ERISA of Section 220 on its face and as applied herein:

> "The law [§ 220] requires that all workers on a public work project be paid the prevailing journey-level wage rates. However, those who are individually registered with the New York State Department of Labor in an apprenticeship training program which is also registered with the State, may be paid an apprentice wage rate. Labor Law § 220(3-e)." (Resp. Br. at 2)

In *Dillingham Constr. N.A. v. Sonoma County*, 57 F.3d 712 (9th Cir. 1995) (***motion for reh'g filed***), the U.S. Court of Appeals for the Ninth Circuit held that a functionally identical provision in California's law impermissibly favored State-registered ERISA plans by conferring upon them beneficial terms that relate to and directly regulate the benefits provided, and thus impermissibly enforced or encouraged selection of State-approved ERISA plans and participants, while burdening others.[8] There, The Ninth Circuit described the statutory scheme in terms virtually identical to those at issue here:

---

[7] One reason for granting review herein is to clarify after *Adarand* the kinds of "affirmative action" efforts that clearly pass Constitutional muster. Here, the Federal training programs afford entry-level opportunities for women and minorities historically excluded from skilled trades, but do so without "set-asides," "quotas" or "racial classifications." See 23 C.F.R. §230.107-.113 and Part 230, Subpart A, Appendix B (B-12-19).

[8] The court in *Dillingham* defined the "issue presented" in the same essential terms as the issues presented herein:

(Footnote continued)

> "Contractors who are awarded public works projects agree to pay prevailing wages to all their construction employees at the journeyman level in specified trades. Public works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman wage so long as those apprentices are part of an approved apprenticeship program under California Labor Code Section 1777.5" (*Id.*, 57 F.3d at 715, footnotes omitted)[9]

This statutory scheme "'has the effect, and possibly the aim' of encouraging participation in state-approved ERISA plans while discouraging" -- or, as here, flatly forbidding -- "participation in unapproved ERISA plans." Such effect is therefore impermissible under ERISA and the Constitution, and is not "saved" by ERISA's savings clause. *Dillingham*, 57 F.3d at 719.

> "If a state is permitted to use a prevailing wage scheme to single out certain ERISA plans over other ERISA plans, the potential for abuse is great -- a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans...."

Id. 57 F.3d at 719, *quoting National Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555, 1559 (10th Cir.), *cert. denied*, 113 S.Ct. 406 (1992).

Because *Dillingham* and *Calhoon* each held State apprenticeship provisions of prevailing wage laws in the States of

---

> "The issue presented in this case is whether ERISA preempts the application of a state prevailing wage law that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval but allows the payment of lower apprenticeship wages to employees participating in state approved programs. We hold that it does." *Id.*, 57 F.3d at 715.

[9] In *Dillingham*, as here, the IBEW was the union benefiting from the State's enforcement of the barriers to employment in skilled trades used to preserve the union's "turf" and to control "entry." Similarly, IBEW locals were also admonished for their discriminatory apprentice criteria, *E.E.O.C. v. JAC,* and for their apparent manipulation of the State's prevailing wage law "to achieve selfish ends." *See General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1457 (2d Cir. 1991). Such unions, and Respondent herein, seek to preserve the status quo of state-sanctioned barriers to entry despite their negative impact on Federal policy and the growing chorus of Federal decisions invalidating these laws.

California and Oklahoma, respectively, to be preempted by ERISA,[10] they are in direct conflict with New York's application of Section 220. Respondent's contrary assertion that there is no "conflict" between the Federal Courts of Appeals and New York (Resp. Br. at 11) appears frivolous. Respondent's argument that it should be permitted to regulate where it is barred because the State's highest court "did not address" the issue, merely demonstrates the need for TAP's petition to be granted: without review, New York will continue to apply Section 220 in a manner barred by Federal law.[11]

Moreover, New York's Court of Appeals *did* address the Constitutional validity of Section 220, by dismissing TAP's appeal in its February 21, 1995 decision "upon the ground no substantial constitutional issue is directly involved" (*TAP IV*) (A-1[12]). The Court of Appeals thereby enforced the Commissioner's Orders, to the extent not annulled by the lower courts, as the law of New York. Such "inaction" is no less a final order reviewable herein. *Street v. New York*, 394 U.S. 576, 579-80 (1969) (Constitutional issue properly before this Court despite N.Y. Court of Appeals' failure to pass upon it).

Further, as detailed below, TAP has fully preserved this important claim at every stage of these proceedings (*see* C-1-29), and it is therefore properly before this Court of last resort.

I. TAP HAS PROPERLY PRESERVED FOR REVIEW ITS ERISA PREEMPTION CLAIM HEREIN

Respondent's assertion that TAP failed to preserve its ERISA preemption claim herein rests on Respondent's rewriting of

---

[10] *See also* cases cited at Petition p.7, n.7, holding preempted similar apprenticeship provisions of Minnesota, Nevada, and Michigan prevailing wage laws.

[11] Since the Federal Courts declined to hear this matter on the ground that TAP had initially sought review in the State court system, this Court offers the only opportunity for review. *See* unreported decision of Mischler, J., *TAP Elec. Contracting Service, Inc. v. Hartnett, et al.*, No. 90-0083, (E.D.N.Y. June 25, 1990), *aff'd*, Nos. 90-7645 and 91-0201 (2d Cir. Jan. 16, 1992).

[12] References to appendices A and B attached to the Petition are denoted herein by (A-[page]) and (B-[page]), respectively. References to Respondent's brief in opposition to the Petition are denoted herein by (Resp. Br. at [page]).

TAP's "claim." TAP's "claim" herein is and has always been that the Commissioner's October 31, 1989 Order (A-28-37)(as modified by his February 6, 1991 Order)(A-10-14) is *null and void in its entirety because it is preempted by ERISA* (C-1, 3). In addition, there is no dispute that TAP asserted ERISA preemption of Section 220's "supplement" provisions from the outset, as Respondent concedes (Resp. Br. at 3; C-4), and that the term "supplements" is specifically defined in Section 220(5)(b) to include "apprentice training" (B-6). Further, the Appellate Division agreed that the "joint education fund" which funds TAP's training program, is "covered and governed by ERISA" (A-24-25), indirectly encompassing the issues herein.

A. TAP Asserted ERISA Preemption in its Initial Judicial Challenge as to the Entirety of the Commissioner's Order

TAP's initial judicial challenge to the Commissioner's 1989 Order, in its Statement of Issues presented (C-3) stated:

> "5. Petitioner seeks an order *reviewing and annulling the Order and Determination* of the Commissioner.... *Vacatur is sought on the grounds, inter alia, that the Order and Determination is preempted by the Employee Retirement Income Security Act of 1974*, that the Commissioner of Labor lacked subject matter jurisdiction....
>
> 6. *This proceeding seeks review and vacatur of each and every part of the Order and Determination*, dated October 31, 1989...." (C-3) (emphasis added)

Thus, TAP directly raised its claim that ERISA preempted all parts of the Commissioner's Order applying Section 220. Despite this reality, in an effort to fashion a "no preservation" argument, Respondent has sought to fragment TAP's petition into separate claims for each element of the Commissioner's Order (Resp. Br. at 3-4, 5: "TAP did not raise the issue of ERISA preemption with respect to the trainee claims...").

The now more limited scope of the issue presented herein is the result of TAP's successful challenge to the balance of the Commissioner's Orders. Because TAP's ERISA preemption challenge to the entirety of the Commissioner's Order was in

large part successful (*see "TAP I"* and *"TAP III"*; A-2 and A-22), Respondent's "non-preservation" argument rings hollow; TAP merely seeks review herein of the remainder of TAP's ERISA preemption claim, i.e., that portion of the Commissioner's application of Section 220 -- the apprenticeship provisions -- that the Court of Appeals' declined to vacate.[13]

This Court has rejected Respondent's premise that each separate "argument" is itself a "claim" that must have been preserved below. In *Street v. New York*, 394 U.S. at 583, this Court held that an issue as to which review is sought can be raised below "in various ways":

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (*Id.*, 394 U.S. at 584)

Similarly, Respondent's contention that each "argument" must have been raised below in identical terms as are presented here (Resp. Br. at 10, n.7) was recently rejected by this Court in *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992):

> "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. *They are rather separate arguments in support of a single claim* -- that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, *petitioners could have formulated any argument they liked*

---

[13] TAP also urges that all of the Commissioner's proceedings in this matter *themselves* constituted an impermissable intrusion into areas reserved by ERISA for exclusive for Federal regulation. 29 U.S.C. 1144(c); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 329 (2d Cir. 1985), *aff'd* 477 U.S. 901 (1986).

in support of that claim here." (*Id.*, 112 S.Ct. at 1532, citations omitted.) (emphasis added)

Nor is TAP bound to have presented the issue in the same terms as it was presented below, because "[t]he petitioner can generally frame the question as broadly or narrowly as he sees fit....without being limited to the manner in which the question was framed below." *Id.*, 112 S.Ct. at 1932. TAP, having plainly raised ERISA preemption of the Commissioner's Orders in their entirety throughout these proceedings, can properly narrow the issue herein to ERISA preemption of the only surviving aspect of those Orders: the application of Section 220's apprenticeship provisions.

B. TAP Asserted and Preserved the Specific Argument Herein as to ERISA Preemption of Section 220's Apprenticeship Provisions.

TAP not only preserved its claim of ERISA preemption with respect to Section 220 generally as applied in the Commissioner's Order, but also preserved its ERISA preemption argument specifically with respect to the apprenticeship provisions (*see* C-6, 7-10).

Upon hearing TAP's initial petition, the Appellate Division *annulled* the portion of the Commissioner's decision forbidding TAP from using Federal "trainees" rather than state-registered "apprentices" (A-22-25). When the Commissioner cross-appealed the decision, *TAP specifically argued that ERISA preempts Section 220's apprenticeship provisions* in response (C-6, 7-10). Thus, Respondent concedes (Resp. Br. p. 10, n.7) that TAP argued ERISA preemption of this precise aspect of the Commissioner's Order on pages 53-57 of its responsive brief to the Court of Appeals when Respondents cross-appealed (*id.*). Accordingly, TAP raised and preserved this issue specifically. *See Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) (issue properly preserved where raised with specificity only upon appeal).

Respondent's reliance on the statement in the 1990 decision of the Court of Appeals (A-16), that the "only argument preserved for review in these cross appeals" was the issue of whether the apprenticeship provisions were preempted by the

Federal Aid Highways Act, is not determinative, for each of several reasons. *First*, Federal law governs the question of "preservation" for review before this Court:

> "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." (*Street v. New York*, 394 U.S. at 583)

Second, Respondent's interpretation of the Court of Appeals' statement is contrary to established New York law, which holds that questions of pure statutory interpretation, as here, *may always be raised on appeal at any level*, even if raised in the first instance before the Court of Appeals.[14] *See e.g.*, *Richardson v. Fiedler Roofing, Inc.*, 67 N.Y.2d 246, 251, 502 N.Y.S.2d 125, 127 (1986) ("The argument raises solely a question of statutory interpretation, which we may address even though it was not presented below"); *accord*, *American Sugar Refining Co. v. Waterfront Comm.*, 55 N.Y.2d 11, 25, 447 N.Y.S.2d 685, 691 (1982). Similarly, in *People v. McDonald*, 68 N.Y.2d 1, 505 N.Y.S.2d 824 (1986), the defendant advanced a new legal issue for the first time on appeal to the Court of Appeals, going to the Court's jurisdiction -- like the ERISA preemption arguments herein. It is the law of New York that such issue may be heard:

> "Because [the newly-raised issue of] appealability goes to the subject matter jurisdiction of the court ... *which may be raised for the first time on appeal to this Court*

---

[14] *Third*, because the Court of Appeals dismissed both parties' requests for appeal as of right, "upon the ground that the order appealed from does not finally determine the proceeding" (*see* A-20-21) (Resp. Br. at 5, n. 4), TAP's constitutional challenge must have been deferred until a "final order" had issued from the Appellate Division, which did not occur until August 29, 1994 (*TAP III*) (A-2). There is no dispute that, following the remittitur, upon subsequent appeal to the Appellate Division, TAP extensively briefed the very aspect of TAP's preemption claim as is asserted herein. (*See* TAP's May 8, 1992 moving brief to the Appellate Division, pp. 27-34 (attached as C-11-18)). While the Appellate Division declined to disturb the Court of Appeals' 1990 decision in this regard (A-7), it cannot seriously be argued that the issue was not raised (*see also* C-19-26, 27-29).

> ... the fact that defendant failed to move before the Appellate Division to dismiss the People's appeal presents no obstacle to our consideration of the question." (*Id.* 68 N.Y.2d at 9, n.9, 505 N.Y.S.2d at 831n.9) (citations omitted) (emphasis added)

Accordingly, the important questions presented for review herein were raised below and properly preserved for review both by challenge to the entirety of the Commissioner's Orders under ERISA and by specific reference to the argument presented herein.[15]

CONCLUSION

For the foregoing reasons, TAP respectfully requests that its Petition for a Writ of Certiorari be granted.

August 4, 1995

Respectfully Submitted,

JAMES S. FRANK
DAVID E. PRAGER

PHILLIPS NIZER BENJAMIN
KRIM & BALLON LLP
666 Fifth Avenue
New York, New York 10103
(212) 977-9700

Attorneys for Petitioner TAP Electrical Contracting Service, Inc.

[15] Further, this Court may address the important issues raised herein, in its discretion. *Carlson v. Green*, 446 U.S. 14, 31, n.2 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

APPENDIX

VERIFIED PETITION

November 14, 1989

The petition of TAP ELECTRICAL CONTRACTING SERVICE, INC., ("Petitioner" or "TAP"), respectfully shows to this Court and alleges:

* * *

3. This is a proceeding to set aside, vacate and annul respondent's Determination and Order dated October 31, 1989, which held that Petitioner wilfully violated Section 220 of the Labor Law by failing to pay prevailing rates of wages and supplements under a contract with the New York State Department of Transportation for lighting replacement on the Northern State Parkway in that it classified and paid three individuals as trainees, that it failed to pay prevailing supplements to or on behalf of 28 employees in that it claimed credit for the full course of apprentice training in accordance with the training program and curriculum certified by the New York State Department of Labor, in that it calculated vacation benefits on the basis of per hours worked for each hour worked by said employees and that it maintained an excessive number of apprentices in violation of the applicable journey level/apprentice ratio for the project.

* * *

5. Under these circumstances, the United States Supreme Court has held that the Federal Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1144 (a) preempts State Prevailing Wage Law in the case of *Local Union 598, Plumbers and Pipe Fitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Company,* 109 S.Ct. 210 (1988).

The scope and extent of the apprentice training program, including hours of work to be assigned and specific areas of electrical construction trade, topics for related instruction and required text books and technical codes are training requirements issued by the Department of Labor after negotiations

with the program sponsor and made part of the contract for apprentice training to which the Petitioner subscribes. . . .

* * *

9. The record is clear that the Davis Bacon Act and related administrative decisions preempt New York State Labor Law in the matter of the use of trainees under United States Department of Transportation Programs and that "ERISA" preempts the New York State Labor Law to the extent that Section 220 is used to have Petitioner pay more than what is required by its collective bargaining agreements and more than what is paid for for the analogous prevailing benefits [and] insofar as the state statute as administered by the Department of Labor purports to regulate contributions for the aforementioned benefits.

* * *

WHEREFORE, Petitioner respectfully requests a judgment pursuant to Article 78 of the Civil Practice Law and Rules:

1. Staying and enjoining Respondent Department of Labor from entering Petitioner's name to the List of Employers ineligible to Bid on or be Awarded any Public Work pending hearing and determination of this proceeding;

2. Reviewing and annulling the subject determination and order of respondence dated October 31, 1989 and filed November 8, 1989;

3. For such other and further relief as to this Court may deem just and proper.

C-3

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

BRIEF ON BEHALF OF PETITIONER-APPELLANT

December 11, 1989

* * *

STATEMENT OF ISSUES PURSUANT TO CPLR 5531

* * *

5. Petitioner seeks an order reviewing and annulling the Order and Determination of the Commissioner of Labor of the State of New York, dated October 31, 1989 and filed November 8, 1989, which determined, *inter alia*, that petitioner wilfully violated Article 8 of the Labor Law. Vacatur is sought on the grounds, *inter alia*, that the Order and Determination is preempted by the Employee Retirement Income Security Act of 1974, that the Commissioner of Labor lacked subject matter jurisdiction, and that the Order and Determination is arbitrary, capricious and not supported by substantial evidence on the record. Petitioner also seeks an order enjoining respondent from enforcing the Order and Determination pending final resolution of this proceeding.

6. This proceeding seeks review and vacatur of each and every part of the Order and Determination, dated October 31, 1989 and filed November 8, 1989, of Thomas F. Hartnett, Commissioner of Labor of the State of New York.

* * *

PRELIMINARY STATEMENT

[p. 1]

This Article 78 proceeding seeks to set aside an order and determination of the Commissioner of Labor enforcing provisions of Section 220 of the Labor Law that have just been

held by the Second Circuit to be preempted by federal law. *General Electric Company v. N.Y. State Department of Labor*, No. 88-7922 (2d Cir. Nov. 29, 1989). Given that the Commissioner has precipitously debarred petitioner from being awarded any public contracts — a step that could be fatal to petitioner's business which is virtually one hundred percent public work — to immediate intervention of this Court is required in order to avert egregiously unjust and irreparable harm.

* * *

[ARGUMENT]

[p 8]

POINT I.

THE COMMISSIONER'S DETERMINATION THAT TAP FAILED TO PAY PREVAILING SUPPLEMENTS MUST BE SET ASIDE BECAUSE THE RELEVANT PROVISION OF SECTION 220 OF THE LABOR LAW IS PREEMPTED BY ERISA.

* * *

[p 12]

B. Application of *General Electric* Requires That the Determination Here Be Vacated

* * *

COURT OF APPEALS
STATE OF NEW YORK

PETITIONER-APPELLANT'S REPLY BRIEF AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

April 23, 1990

* * *

COUNTER-QUESTIONS OF LAW PRESENTED FOR REVIEW

* * *

(3) Whether Section 220, as applied by the Commissioner in this case, is preempted by the Employee Retirement Income Security Act of 1974 because it relates to and regulates the operation of an ERISA-covered apprenticeship and training plan.

* * *

[ARGUMENT]

[pp. 29-30]

IV. AS THE APPELLATE DIVISION CORRECTLY CONCLUDED, TAP'S USE OF USDOL TRAINEES ON A FEDERALLY FUNDED PROJECT AT FEDERALLY-APPROVED WAGE RATES WAS LAWFUL.

The Commissioner of Labor determined that Section 220 of the Labor Law prohibited TAP from employing three USDOL trainees at federally approved wage rates on the Northern State Parkway project, which was funded principally by the federal government. The Appellate Division's decision vacating that determination is correct and should be affirmed for several independent reasons.

First, the Commissioner's interpretation of Section 220 — which creates a conflict with federal law and undermines the

federal presence in the important area of skills training for minorities and women in the highway construction industry — is neither required by the terms of the statute nor intended by the Legislature. It is also contrary to the well-established principle that state law should, whenever possible, be construed in a manner that *avoids* conflict with federal law. The Commissioner's interpretation of Section 220 is, therefore, incorrect as a matter of statutory construction.

Second, if the Commissioner's interpretation is correct, Section 220 is, to that extent, preempted by the Federal-Aid Highways Act ("FAHA"). The FAHA, together with the regulations promulgated thereunder, establishes federal affirmative action training goals and the means the federal government has selected for achieving those goals — including the payment of trainee wage rates. As interpreted by the Commissioner, Section 220 is an obstacle to the accomplishment of the full purposes and objectives of the FAHA and, accordingly, is preempted.

Third, as applied by the Commissioner in this case, Section 220 is preempted by the Employee Retirement Income Security Act of 1974. State law is preempted by ERISA to the extent it "relates to" an ERISA-covered employee benefit plan. TAP's training and apprenticeship program, under which the USDOL trainees were employed, is an employee benefit plan within the meaning of ERISA. Section 220, as applied by the Commissioner, "relates to" that plan and therefore is preempted by ERISA because, by prohibiting the use of USDOL trainees at wage rates provided for in the plan, it directly alters the terms of the plan, including its wage rates and eligibility criteria.

* * *

[pp. 53-57]

D. As Applied By The Commissioner Here, Section 220 Relates To An Employee Benefit Plan And, Therefore, Is Preempted By ERISA.[29]

Section 514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title. . . ." 29 U.S.C. § 1144(a). As pointed out in TAP's main brief, the Supreme Court has stressed that "the express preemption provisions of ERISA are deliberately expansive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987). This is plain not only from the terms of the statue but also from its legislative history — which evidences a Congressional intent to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" and to apply the preemption principle "in its broadest sense to all actions of state or local governments . . . which have the force or effect of law." *Id.* at 46 (*quoting* 120 Cong. Rec. 29933 (1974)).

TAP employed its trainees pursuant to an apprenticeship and training program administered by the Joint Apprenticeship and Training Council, of which TAP is a member. The program, described in Articles 33 and 34 of TAP's collective bargaining agreement with Local 363 (Resp. Exh. 15 at 27-34, A. 130-137), provides training for both state-registered apprentices and USDOL trainees. Funding for the program is provided by a "Joint Educational Fund" to which TAP is required by the collective agreement to pay 3 1/2 percent of its gross wage payroll. Apprentice and trainee program participants are paid pursuant to a program wage scale under which "apprentices and trainees working on the same job site . . .

---

[29] Although the Appellate Division did not expressly reach this issue, it is properly before this Court as an additional rationale for affirming the Appellate Division's decision to annul the Commissioner's order and determination with respect to TAP's use of trainees. *See Sega v. State of New York*, 60 N.Y.2d 183, 190 n.2 (1983).

receive identical wages and benefits." (Resp. Exh. 15 at 33, A. 136)

There can be no question that TAP's apprenticeship and training program is an employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(1).[30] *See Local Union 598 v. J.A. Jones Const. Co.*, 846 F.2d 1213 (9th Cir.), *aff'd mem.*, 109 S. Ct. 210 (1988); *Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989); *Associated Builders and Contractors, Inc. v. McDonald*, CV-N-89-409, 1989 U.S. Dist. Lexis 16401 (D. Nev. 1989); Decision at 3, A. 4. It is equally clear that Labor Law § 220, and the Commissioner's order applying it, are "state law" under ERISA. *See* 29 U.S.C. § 1144(c)(1).

A state law "relates to" an employee benefit plan, and accordingly is preempted under Section 514(a) of ERISA, "if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983) (citation omitted). As applied by the Commissioner in this case, Section 220 plainly "relates to" TAP's ERISA-covered apprenticeship and training program.

First, as interpreted by the Commissioner, Section 220 directly regulates the substantive terms of TAP's training program. By requiring that trainees be paid journey-level wages, Section 220 abrogates the program's wage schedule for trainees and, at the same time, requires that training program

---

[30] The statute defines "employee welfare benefit plan" in pertinent part as follows:

> Any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . apprenticeship or other training programs . . . .

29 U.S.C. § 1002(1).

participants be paid at a rate established by the Commissioner of Labor. ERISA, however, having "preempted the field" of employee benefit plan regulation, preempts state laws that regulate the substantive terms of employee benefit plans. *See Shaw v. Delta Airlines*, 463 U.S. 91 (1983); *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989).

Accordingly, Section 220 "relates to" an employee benefit plan and is preempted by ERISA to the extent it requires TAP to pay training program participants at a wage rate other than that specified in the training program wage schedule. *See Hydrostorage, Inc. v. N. Cal. Boilermakers Local Joint Apprenticeship Comm., supra*, 891 F.2d 719; *Associated Builders and Contractors, Inc. v. MacDonald, supra.*

Section 220, as applied by the Commissioner, further "relates to" an ERISA-covered plan because it has the effect of regulating the eligibility requirements for participation in TAP's apprenticeship and training program. According to the terms of the plan, two groups of individuals are eligible to participate in the program: (1) federally-approved trainees; and (2) state-registered apprentices. Under the Commissioner's interpretation of Section 220, however, USDOL-approved trainees are effectively prevented from participating in the plan. *See* pp. 35-38, *supra.*

There is no question that Section 220 would be preempted if it directly regulated the eligibility criteria for the apprenticeship and training program. *See* pp. 53-55, *supra*. That the state accomplishes this prohibition indirectly (*i.e.*, by requiring the payment of journey-level wages as a prerequisite to participation) does not make it any less a regulation preempted by ERISA. It is well-established that the state is preempted from doing indirectly what it may not do directly. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 325-26 (1981).

* * *

In sum, the Commissioner's interpretation of Section 220 as prohibiting the use of USDOL trainees on federally funded projects at wage rates approved by the federal government is an unreasonable and insupportable construction of the statute. If this Court should conclude, however, that such an interpretation is compelled, then Section 220 is preempted by the FAHA and, in the factual circumstances presented here, by ERISA as well.

* * *

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

PETITIONER-APPELLANT'S BRIEF

May 8, 1992

* * *

STATEMENT OF ISSUES PURSUANT TO CPLR 5531

* * *

5. This appeal, which arises after a remittitur from this Court, affirmed and remanded by the Court of Appeals, *TAP Electrical Contracting v. Hartnett*, 156 A.D.2 612, 549 N.Y.S.2d 118 (2d Dept. 1989), *aff'd in part, rev'd in part*, 76 N.Y.2d 164 (1990), seeks reversal of a debarment order issued under New York Labor Law § 220 and presents substantial and important issues regarding the application of Labor Law § 220:

> (1) whether the Commissioner's order upon remission is unconstitutional as preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq* ("ERISA"), which preempts state laws that relate to plans governed by ERISA. *See General Electric v. Department of Labor*, 891 F.2d 25, 29-30 (2d Cir. 1989), *cert denied*, 110 S. Ct. 2603 (1990), *on remand*, 936 F.2d 1448 (2d Cir. 1991);
>
> * * *
>
> (3) whether the Commissioner's Order constitutes a state regulation of trainee wages pursuant to a prevailing wage law that is preempted by ERISA. *See Electrical Joint Apprenticeship Committee, et al. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991) (Decided Nov. 8, 1991) ("*MacDonald*"). (While this Court's earlier unanimous decision (549 N.Y.S.2d 118) was reversed by the Court of Appeals (76 N.Y.2d 164) pursuant to *Monarch Electrical*

Contracting v. Roberts, 70 N.Y.2d 91 (1987), *MacDonald* necessitates invocation of the supremacy clause of the United States Constitution);

* * *

STATEMENT OF QUESTIONS ON APPEAL

* * *

2. Whether the Order appealed from is void as impermissably relating to an employee benefit plan, subject to the Employee Retirement Income Security Act ("ERISA"), and therefore is preempted by ERISA § 514 for any of the following reasons:

(a) it applies a portion of petitioner's cash payments to supplements provided by petitioner through its ERISA plans;

(b) it imposes a state registration requirement for petitioner's ERISA apprenticeship program in excess of the requirements imposed by the National Apprenticeship Act;

(c) it purports to regulate the ratio of apprentices to journeymen in petitioner's ERISA training program; or

(d) it requires petitioner to make contributions or payments equivalent to those required by a local union's ERISA plans.

* * *

6. Whether the order debarring petitioner from bidding on or being awarded public work contracts is *void ab initio* where it is premised upon an arbitrary and capricious, federally preempted or unconstitutional application of a state statute, or where the statute is facially unconstitutional.

* * *

[ARGUMENT]

[pp. 27-33]

B. ERISA Preempts DOL's "Registration" Requirements for Apprenticeship Programs; DOL Can Not Refuse to Recognize Federally-Approved "Trainees" as Equivalent to State-Registered "Apprentices."

1. The United States Department of Labor Approved TAP's Training Program

TAP employed three federally-approved "trainees" hired through, and paid at the rates set forth in, a training plan approved by the Federal Highway Administration and the New York State Department of Transportation. (App. 350). TAP's training plan was administered jointly with Local 363 of the International Brotherhood of Teamsters/Joint Apprentice Committee ("Local 363 IBT/JAC"), and employed only certified participants in a U.S. Department of Labor ("USDOL") training program (App. 350; 354; 417-19; 440).

The Plan was approved by the U.S. Bureau of Apprenticeship and Training ("BAT") pursuant to the requirements of the Fitzgerald Act. (App. 418-19; 440; *see* 76 N.Y.2d 164.)[33] TAP's contract with DOT *required* use of federally-approved trainees (App. 417-421), and even subsidized their use (App. 406). Nevertheless, the Commissioner's 1989 Order found that TAP violated Section 220 by paying the three trainees as apprentices because this federally-approved program was not additionally "registered" as a state-approved apprenticeship program.[34]

---

[33] It is also undisputed that both the Federal Highway Administration ("FHWA") and New York State's Department of Transportation approved TAP's training proposal, including its wage rates, and incorporated it in the project contract. (App. 417-19).

[34] The N.Y. Court of Appeals in *Monarch Elec. Contracting Corp. v. Roberts*, 70 N.Y.2d 91, 517 N.Y.S. 2d 711 (1987), discussing the very USDOL

(Footnote continued)

2. TAP's Training Program Was an Employee Benefit Plan Under ERISA.

TAP's training program, the Local 363 IBT/JAC, through which TAP employed three trainees, is an ERISA-covered plan and is financed by an ERISA-covered trust fund, the Local 363 Joint Education Fund. The Local 363 Joint Apprenticeship Committee sets the rules and regulations governing eligibility, participation, education and operation of the trainee program.

ERISA expressly covers apprenticeship programs such as TAP's, as an "employee welfare benefit plan", which includes "*apprenticeship or other training programs*". 29 U.S.C. § 1002(1) (emphasis added). TAP's IBT/JAC training program is therefore an employee welfare benefit plan under ERISA. *See Hydrostorage, Inc.*, 891 F.2d at 726-27; *J.A. Jones*, 846 F.2d at 1217.

3. DOL Interprets Section 220 to Impose the Additional Requirement of State Registration Upon Federally-Approved Training Programs.

The Commissioner found, in his 1989 Order, that "TAP's underpayment of prevailing wages and supplements to three individuals it classified as 'trainees' on the project was a willful violation of Article 8 [Section 220(3-e)] of the Labor Law." (App. 337) It based this conclusion on the Hearing Officer's Report that:

(. . . continued)

training program in which TAP's employees participated, noted that, "[a]s found by the hearing Officer, the Federally registered trainee programs and the State registered apprenticeship programs are *virtually identical* in wages, on-the-job training and related classroom instruction. The only significant difference between them is in the entrance requirements. The requirements of the trainee programs are job-related and much less stringent than those of State-approved apprentice programs, having been designed to promote minority group participation." (70 N.Y.2d at 97) (emphasis added).

> Section 220(3) of the Labor Law is very clear and unambiguous in its recognition of only two classifications of workers, journeymen and apprentices. Section 220(3-e) clearly states that only those individuals *registered* in a bona fide apprenticeship program with the *New York State Department of Labor* shall be paid apprentice-level wages. Any employee not registered in such a program 'shall be paid [journeyman rates].'

(App. 365).

Because none of the three federally-approved trainees were "enrolled in . . . an apprenticeship program *registered* with the New York State Department of Labor," (App. 364) the Commissioner held that TAP was required to pay them at journeyman payscale, and had thus "underpaid" them for that period. (App. 337). Had the Local 363 IBT/JAC program been registered with the DOL, there would have been no underpayment of wages.

4. ERISA Preempts State-Imposed Registration Requirements on Federally-Approved Fitzgerald Act Training Programs.

DOL applied Section 220 to impose a registration requirement over and above the requirements for training programs set by the Federal Government. This is proscribed by however under federal law because "*any State regulation of apprenticeship programs that is separate and apart from the authorization given by the Fitzgerald Act and its accompanying regulations is preempted by ... ERISA*." *MacDonald*, 949 F.2d at 274 (emphasis added).[35] Any denial of exemption

---

[35] The Fitzgerald Act regulations establish U.S. Department of Labor oversight for administering registration and approval of apprenticeship programs under the aegis of the BAT, Employment and Training Administration. 29 C.F.R. § 29.1; *Id.* The Fitzgerald Act regulations, 29 C.F.R. §§ 29.3(a) and (b), provide for a "dual system of approval and recognition" for apprenticeship programs, allowing *either* State Apprentice

(Footnote continued)

from prevailing wages under State law to a USDOL approved apprenticeship program, effectively asserts State-law standards over the program in contravention of ERISA, because a "program that meets the requirements of the Fitzgerald Act [meets] *the only apprenticeship regulations that are permissible as not being preempted by Section 514(a) of ERISA*." 949 F.2d at 274. (emphasis added).

Thus, as a matter of federal law, any interpretation of the State prevailing wage law that imposes additional standards or requirements in excess of those mandated by Federal law, is an application that "compels preemption." *Id.* While the Ninth Circuit's permanent injunction only enjoined the Nevada Labor Commissioner from enforcing that state's prevailing wage statute, *id.*, given the virtual identity between the Nevada and New York statutes in this regard, the same result must obtain here.[36]

The operative facts in *MacDonald* are also indistinguishable from the facts here. The Commissioner may not lawully refuse -- as he has -- to treat as the equivalent of

---

(. . . continued)

Councils or the Federal Bureau to approve an apprenticeship program for Federal purposes. However, it is clear that "*either agency is constrained in its approval to apply the requirements and standards of the Federal regulations*." 949 F.2d at 273 (emphasis added).

[36] The Nevada statute provided an exemption from public works prevailing wage rates for "apprentice programs approved by the State Apprenticeship Council, but [did] not allow such exemption for apprenticeship programs approved by the Bureau of Apprenticeship and Training of the United States Department of Labor." (Nevada Rev. Stat. §§ 339,010 - 338,090.)

There, as here, employers on public works projects were constrained to pay trainees in federally approved programs full journeymen wages, despite their USDOL approval, merely because the program did not meet the additional requirement of State approval. The Court noted that "prevailing wage statutes for public work, present a significant obstacle, unless apprenticeship programs are exempted" because "for an apprenticeship program to work, it is essential that the employer pay lesser wages to apprentices while they are in training." 949 F.2d at 274.

state-registered apprentices any of TAP's participants in its training program which is approved by the USDOL pursuant to the Fitzgerald Act, by imposing State registration or other State standards "separate and apart from the authorization given by the Fitzgerald Act." Those additional State law requirements impermissibly "relate to" or "purport to regulate"[37] an ERISA-covered plan, and are preempted.[38]

5. Federal Training Programs Further the Compelling National Policy of Combatting Discrimination in the Construction Industry.

The purpose served by ERISA preemption as described in *MacDonald* is significant: It breaks down state barriers to minority employment in the construction industry. (*Cf. Monarch*, 70 N.Y.2d at 97-98, where the Court held that it was not its province to correct the inequitable treatment of minority persons denied entrance to the state-registered apprenticeship programs). Indeed, the United States Supreme Court has observed that the "[j]udicial findings of exclusion from craft [unions] on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).

Section 220, as applied herein by DOL, "unexpectedly frustrates the very important policy of reducing discrimination

---

[37] Indeed, here, DOL purports to regulate, through Section 220, TAP's ERISA trainee plan by purporting to regulate, directly or indirectly, the terms and conditions under which trainees in the plan are employed, their payscale, and indeed, their very employment itself. *See also Hydrostorage*, 891 F.2d at 729-32 (state apprenticeship standards preempted by ERISA because they regulate "indirectly but substantially," an ERISA plan).

[38] While the Court of Appeals affirmed the violation in this regard on the interim appeal on other grounds, it did not address the issues raised herein -- ERISA preemption of the application of the Statute. Since the Court of Appeals in *Monarch* recognized the unfortunate consequences of this aspect of Section 220, TAP respectfully urges reconsideration of the prior decision, in light of *MacDonald*.

in the construction labor force." 70 N.Y.2d at 99. While state registration of apprentice programs once served the worthy goal of eliminating "sham" programs, it now serves only to perpetuate -- with judicial acquiescence -- exclusionary strangleholds over entry-level participation in employment training programs. Since the New York's Court of Appeals has recognized that the USDOL training program in which TAP's employees participated was part of a "compelling policy" by the federal government "to remedy the effects of ... longstanding discrimination in the construction industry," *Monarch*, 70 N.Y.2d at 97,[39] TAP's participation therein should not be held to have created a violation of Section 220. Accordingly, there is every reason for this Court to apply the holding and rationale of the *MacDonald* case herein.

C. DOL's Purported Regulation of Apprentice/Journeymen Ratios Is Preempted by ERISA.

* * *

---

[39] The N.Y. Court of Appeals in *Monarch* "regrettably" observed that the State Legislature, in enacting the apprentice-registration provisions of Section 220 "did not likely foresee that bona fide, federally approved trainee programs ... would be rejected as acceptable pools of learning-level workers. Nor could it have foreseen that, by prohibiting the payment of apprenticeship wages to unregistered apprentices, it was also prohibiting the payment of apprenticeship wages to 'trainees' enrolled in these federally administered programs, and thus anomalously requiring that these 'trainees' be paid a wage four times greater than that paid to their counterpart 'apprentices.'" (70 N.Y. at 98-99). As noted, TAP was contractually required to employ trainees in a federally-approved program (App. 417-421).

In this regard, we note that it is well established and now a federal law (the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)) that facially neutral employment practices that have a disparate impact on minority persons are unlawful. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In such circumstances, TAP respectfully submits that the court can no longer countenance legislative delay in eliminating these "unforeseen" consequences of Section 220.

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

PETITIONER-APPELLANT'S REPLY BRIEF

August 20, 1992

* * *

[ARGUMENT]

[pp. 14-21]

II. TAP's DEBARMENT BASED ON TRAINEE WAGES MUST BE RECONSIDERED IN LIGHT OF *MACDONALD* AND *CALHOUN*, AND IN LIGHT OF THE PROPER CREDITING OF TAP'S CASH PAYMENTS

A. Res Judicata Does Not Bar Consideration of *MacDonald* or *Calhoun*.

ERISA preemption pursuant to *Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir., 1991) *cert denied*, 112 S.Ct. 2991 (1992) and *National Elevator Industry v. Calhoun*, 957 F.2d 1555 (10th Cir. 1992), divests the court of jurisdiction to enforce any state registration or other requirements for state approval of training programs, that are in excess of those authorized by federal law. This preemption issue is essentially a "question of subject matter jurisdiction." *Nuernberger v. State of New York* 41 N.Y.2d 111, 115-17 (1976); *Little v. Dow Chemical Co., Inc.*, 559 N.Y.S.2d 788, 790 (Sup. Ct. Erie Cty 1990). "As such, preemption need not be pleaded, cannot be waived, *and may be raised at any point in the course of litigation*". *Little*, *supra* at 790 (emphasis added), citing *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 324. Accordingly, there can be no *res judicata* bar to hearing this argument, *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976), and if successful, it may even render the Court of Appeals decision herein void to the extent it adjudicated matters outside the Court's proper jurisdiction. *Robinson*, *supra* at 324; see 21 C.J.S. Courts § 18 (1990).

Even if there could be a res judicata bar to a preemption issue, such would be inapplicable herein because the issue decided by the Court of Appeals is not the issue raised on this appeal. The New York Court of Appeals declined to review as of right any issues raised on appeal of this Court's 1989 decision herein on the grounds that "the order appealed from does not finally determine the proceeding within the meaning of the Constitution" (see Resp. Br., App. 011). While the Court did grant leave to appeal, it subsequently held that "[t]he only argument preserved for...review" was "whether the holding in *Matter of Monarch Electrical Construction Corp. v. Roberts*, 70 N.Y.2d 91 (1987) applies to construction projects jointly funded by the State and Federal governments under the [FAHA]". 76 N.Y.2d at 168. No other issue was reached or reviewed. Accordingly, there is no final determination herein except as to the above-referenced application of *Monarch*. TAP does not seek to relitigate that issue. Rather, TAP raises a completely different issue never before litigated in this or any other New York Court, to our knowledge, concerning ERISA preemption.[14]

Moreover, TAP respectfully submits that the compelling nature of the civil rights concerns involved herein mandate review of the merits of this issue.[15] As the Court of Appeals noted in *Monarch*, the USDOL training program at issue here is virtually identical to state-registered programs, except as to entrance requirements, which are "designed to promote minority group participation." 70 N.Y.2d at 97. Indeed, the very purpose of USDOL programs such as TAP's is to loosen the vice-grip of local trade unions over entry into skilled crafts, which have excluded minority workers for so long "as to

---

[14] See Weinstein Korn & Miller, *New York Civil Practice*, ¶ 5011.11 p. 50-105, 106 (when issues are remanded in part, res judicata attaches only to those decided)

[15] See Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.*; *Griggs v. Duke Power Co.* 401 U.S. 424, 1 (1971) (Title VII forbids otherwise lawful provisions that have a disproportionate adverse effect on minorities.)

make such exclusion a proper subject for judicial notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1; *Monarch, supra*, 70 N.Y. at 98-99.

The *Monarch* Court recognized that the same federally-approved training program in which TAP's employees participated was part of the "compelling policy" to remedy the effects of ... longstanding discrimination in the construction industry," and "regretted" the apparently "unforseen" adverse effects of the state registration provisions of Section 220. *Id.* While the Court felt constrained to enforce the provisions of Section 220 as written as a matter of state law, at least until the legislature acts to alter them, 70 N.Y.2d at 98-99, it did not consider the impact of federal law on Section 220. However, since *GE I* and *GE II*, it is clear that Section 220 is not immune to federal law preemption. Thus, it is now established that in enacting ERISA, the federal legislature *has* acted to alter the application of state laws like Section 220.[16] ERISA is a comprehensive scheme of federal preemption over state regulation of employee welfare benefit plans, including TAP's ERISA-covered training program. *See e.g. Delta Air Lines v. Kamarasky*, 650 F.2d 1287, 1303 (2d Cir. 1981), *aff'd as mod.* 463 U.S. 85, 97 (1982). The *MacDonald* case makes clear that the ERISA scheme, including its "savings" clause for federal regulation of such programs, sets up a system by which both states and the federal government may regulate training programs, provided only that "either agency is constrained in its approval process to apply the requirements and standards of *federal* regulations." *MacDonald, supra*, 949 F.2d at 273 (emphasis added). Accordingly, MacDonald held that ERISA *preempts "any state regulation" of such programs* "that is separate and apart from," or in excess of, the regulations imposed by Federal law. *Id.* at 274. Stated conversely, any training program that meets federal

---

[16] While two bills were introduced to change this aspect of ERISA preemption (S. 794; H.R. 2782), they did not pass the Congress.

approval, as TAP's program has, must also necessarily meet with state approval.[17]

The *MacDonald* analysis applies fully here. Respondent does not dispute that: (i) TAP's USDOL-approved training program is a welfare benefit plan subject to ERISA; (ii) the State DOL has enforced State registration requirements for TAP's program that exceed those set by the federal government for the same program; and (iii) if TAP's federally-approved program had met the additional requirement of state registration, TAP's trainees would have qualified for "apprentice" rates under Section 220. These conceded facts are virtually identical to the facts in *MacDonald*; the holding and compelling reasoning there mandates preemption of the additional state-registration requirements at issue here.

The distinction in terminology between state "apprentice" programs and state "training" programs relied upon by Respondent (a) is factually incorrect, as the USDOL letter attached for the Court's convenience as Addendum A hereto shows,[18] and (b) has no impact on the underlying rationale of *MacDonald*. However termed, states may not, consistent with ERISA, require that trainees in federally-approved training or apprenticeship programs be paid journeymen's wages as a means to effectively defeat their participation. See 949 F.2d at 274. The same is true for a state "registration" requirement beyond that imposed by federal regulations. Undergirding the *MacDonald* analysis is the reality that such additional state requirements -- whether intentionally or as an "unforeseen" consequence -- unfairly and selectively blockade entry to

---

[17] "BAT approval is equivalent to state approval." *Id.* at 275.

[18] That "distinction" does not even apply here: on March 3, 1981, and at all relevant times thereafter, TAP's program was approved by the U.S. Department of Labor Bureau of Apprenticeship and Training under the "standards...and directives set forth in Title 29 CFR § 29 [Fitzgerald Act Regulations] 'Labor Standards for Registration of *Apprenticeship* Programs.'" (Addendum A, emphasis added). *See also MacDonald*, 949 F.2d at 272, n.1.

craft-worker trainees. See 949 F.2d at 272. Accordingly, ERISA preemption should be embraced by this Court as in *MacDonald* as the chariot to achieve the laudatory goals that the Court of Appeals was "regrettably" unable to achieve when "constrained" by a purely state-law analysis.

The two lower court cases relied upon by Respondent to distinguish *MacDonald*, *Dillingham Construction v. County of Sonoma*, 778 F.Supp. 1522 (N.D. Cal. 1991), and *Associated Builders and Contractors v. Curry*, 1992 WL 171906 (N.D. Cal. 1992), are inapplicable here because in neither case did the state agency apply standards for registration that exceeded those promulgated federally; rather those programs did not meet *federal* standards. Further, the *Curry* court expressly declined to follow the holding or reasoning of *GE I* and *II*, 1992 WL 171906 at 8, and thus may not be relied upon in this federal circuit. Thus, neither case vitiates the force of *MacDonald*. (*Dillingham* did not involve a training program that met federal approval (as here) -- the key fact in *MacDonald* that triggers the preemptive effect of ERISA is a state requirement that *exceeds* those promulgated federally; *Curry* involved a training program that did *not* meet federal approval by the Bureau of Apprenticeship and Training ("BAT") under the Fitzgerald Act, 29 U.S.C. § 50,[19] see 1992 WL 171906 at 3.) By contrast, here the DOL has, in fact, refused to recognize TAP's federally-approved and BAT-approved training program, and thus has by definition asserted requirements in excess of those required federally. Those excess requirements are preempted by ERISA. *MacDonald*, supra at 275.

---

[19] Moreover, in *Curry*, the Court agreed that portions of the State's prevailing wage law "not saved by the Fitzgerald Act are pre-empted" 1992 WL 171906 at 10.

B. *Calhoun* Compels Preemption of Respondent's Application of Section 220 to Federally-Approved Training Programs.

The United States Court of Appeals for the Tenth Circuit has now added its voice to the chorus of circuits finding state prevailing wage laws that purport to regulate training programs preempted by ERISA. *Calhoun*, *supra*, 957 F.2d 1555 (10th Cir. 1992).[20] In *Calhoun*, the Tenth Circuit held that a state prevailing wage law could not "favor" one ERISA-covered training program over another, by permitting the approved program to pay its "helpers" (i.e., trainees) lesser, apprentice wages, while the disfavored plan was required to pay its "helpers" full "mechanic" (i.e., journeyman) rates. The Court held this application of the prevailing wage law held preempted by ERISA:

> [A] wage law that provides an option favoring certain ERISA plans and benefits (BAT approved [training] plans) over other ERISA plans and benefits (NEIEP [training program]) is not a law of "general application" and may be used to effect change in the administration structure and benefits of an ERISA plan. If a state is permitted to use a prevailing wage scheme to single out and favor certain ERISA plans, the potential for abuse is great--a state could avoid ERISA's preemption provision and covertly disturb or alter ERISA plans. We believe that defendants' ruling would discourage non-BAT approved ERISA training programs and encourage changes to NEIEP [training program], a national employee benefit program. We hold that defendants' ruling applying the state's prevailing wage law does "relate to" an employee benefit plan because the ruling's effects of NEIEP

---

[20] *Calhoun* makes no distinction between "apprenticeship" and "training" programs.

> are not "tenuous, remote or peripheral." *See Shaw*, 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 n. 21.

957 F.2d at 1561.[21]

Calhoun compels preemption of Respondent's application of Section 220, because Respondent has expressly favored only state-approved training programs, while disfavoring TAP's federally-approved training plan.[22]

III. THE FITZGERALD ACT DOES NOT PRESCRIBE APPRENTICE RATIOS, AND THUS DOES NOT SAVE RESPONDENT'S ORDER FROM PREEMPTION

Although DOL's 1989 Order as to "apprentice ratios" forms no part of the debarment order herein, TAP maintains a keen interest in that aspect of DOL's Order, because it affects the viability of TAP's training plan. The Eighth Circuit's holding in *Boise Cascade v. Peterson*, 939 F.2d 632 (8th Cir. 1992), *cert denied*, 112 S.Ct. 3014 (1992) unambiguously holds that ERISA preempts state regulation of "ratios" of trainees to journeymen, because such regulation intrudes most directly upon the terms of the ERISA plan. *Calhoun*, *supra*, is in full accord with *Boise Cascade*.

Contrary to Respondent's contentions (Resp. Br. 39-40), the Fitzgerald Act nowhere prescribes apprentice ratios.

---

[21] *Calhoun* also rejected the state department of labor's argument that its application of the state prevailing wage law was spared from preemption by the Fitzgerald Act, 29 U.S.C. § 50, which the Court held "relates only to eligibility for federal registration" and "does not itself contemplate enforcement mechanisms". 957 F.2d at 1562.

[22] In addition, once TAP's cash payments are properly credited, pursuant to Point I above, not only are all shortfalls in non-ERISA supplements fully offset, but so are the shortfalls in journeymen's wages that were assessed as to TAP's three trainees, during their period of employment. Thus, even if Respondent's position as to trainees is sustained, no DOL order has concluded, based on a calculation properly crediting TAP's excess cash payments, that any underpayment ever existed as to the three trainees. If none exists, as is the case, the debarment order must be dissolved retroactively.

Rather, the applicable Fitzgerald Act regulations, 29 C.F.R. § 29.5(b)(7), merely require that the program *contain* written standards of numeric ratios of apprentices to journeyman, and do not proscribe the content of those standards. Respondent's attempt to enforce ratio standards "separate and apart" from the authorization of the Fitzgerald Act, is therefore pre-empted. *MacDonald, supra*; *Boise Cascade, supra*; *Calhoun, supra*; *accord, Associated Builders, supra*, 1992 WL 171906 at 10.

* * *

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
31 West 52nd Street
New York, N.Y. 10019-6167
(212) 977-9700

January 13, 1995

Mr. Donald M. Sheraw
Chief Clerk of the Court
State of New York
Court of Appeals
Clerk's Office
20 Eagle Street
Albany, New York 12207

Re: M/O Tap Electrical Contacting Service Inc. Petitioner-Appellant v. Thomas M. Hartnett, Respondent-Respondent; App. Div. 2d Dep't Index No. 91-06489

Dear Mr. Sheraw:

This letter sets forth the response of petitioner-appellant TAP Electrical Contracting Service, Inc. ("TAP") to the Court of Appeals' January 5, 1995 *sua sponte* inquiry with respect to the jurisdictional basis of TAP's appeal, noticed on December 22, 1994. Therein, TAP noticed its appeal as of right from that portion of the August 29, 1994 Order and Judgment of the Appellate Division, Second Department which failed to annul as unconstitutional portions of a Determination and Order of the Commissioner of Labor of the State of New York (the "Commissioner's Determination") holding TAP in wilful violation of N.Y. Labor Law §220(3) and thereby "debarring" TAP from bidding on or receiving public works contracts for a 5-year period pursuant to § 220-b(3)(b).

A substantial constitutional question is directly involved in this appeal, as is demonstrated more fully below, because TAP's petition herein challenged the "apprenticeship" provisions of N.Y. Lab. Law § 220(3) as preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq* ("ERISA"), and hence void as unconstitutional under the Supremacy Clause of the United States Constitution.

* * *

Substantial Constitutional Question

TAP's appeal herein raises the substantial constitutional question of whether the "apprenticeship" provisions of N.Y. Labor Law Section 220(3) impermissibly "relate to" and "purport to regulate" TAP's training program, which is an employee welfare benefit plan exclusively subject to federal regulation under ERISA § 514(a) and (c), 29 U.S.C. § 1144(a) and (c). If so, such apprenticeship provisions are void under the Supremacy Clause of the United States Constitution: "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an act of Congress." *Hayfield Northern R. Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 627, and n. 4 (1984); *Rose v. Arkansas State Police*, 107 S.Ct. 334, 335 (1986).

In further demonstration of the substantiality of this issue, we note that state prevailing wage laws and apprenticeship regulations similar to N.Y. Labor Law §220(3) that affect or purport to regulate ERISA plans have been widely held unconstitutional as preempted by ERISA. *See Electrical Joint Apprenticeship Committee v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), *cert. denied* 112 S.Ct. 2991 (1992); *Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 3014 (1992); *National Elevator Industry v. Calhoun*, 957 F.2d 1555 (10th Cir. 1992), *cert. denied*, 113 St.Ct. 406 (1992); *General Electric Corp. v. New York Dept. of Labor*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); *ABC, Saginaw Valley Area v. Perry*, 2 WH Cases 2d 754 (E.D. Mich. 1994); *see generally, District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580 (1992) and cases cited therein. Indeed, the Second Circuit has recently further expanded its interpretation of the breadth of the ERISA preemption provisions to encompass an indirect effect on employee benefit plans. *Travelers Insurance Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993) (reversing *Rebaldo v.*

Cuomo, 749 F.2d 133 (2d Cir. 1984)), *cert. applied for*, 62 USLW 3625 (1994).

* * *

Accordingly, TAP respectfully submits that a substantial Constitutional issue is directly involved herein, and has been raised below; TAP therefore seeks appeal to this Court as of right herein.

Thank you for your attention.

Respectfully Submitted

/s/

JAMES S. FRANK, ESQ.
DAVID E. PRAGER, ESQ.

Phillips, Nizer, Benjamin, Krim
& Ballon
31 West 52nd Street
New York, New York 10019
(212) 977-9700

Attorneys for Petitioner-Appellant
TAP Electrical Contracting
Service, Inc.

cc: G. Oliver Koppell
Attorney General for the State of New York
120 Broadway, 3rd Floor
New York, NY 10271

[PAGES FROM PETITION, APPENDIX A, PP. 38-39 WHICH MAY HAVE BEEN INADVERTANTLY OMITTED IN PART FROM CERTAIN COPIES, RE-INCLUDED HEREIN]

SUPREME COURT — STATE OF NEW YORK

SHORT FORM ORDER

Present: HON. ELI WAGER Justice.

In the Matter of the Application of TAP ELECTRICAL CONTRACTING SERVICE, INC., PRIME CONTRACTOR Petitioner	TRIAL/IAS, PART X NASSAU COUNTY INDEX NUMBER 21830, 1989
For a Judgment pursuant to Article 78 of Civil Practice Law and Rules -against-	MOTION DATE November 22, 1989
THOMAS F. HARTNETT, as Commissioner of Labor of the State of New York Respondent	CHAMBERS NUMBER SP-2858 TRIAL CAL. NUMBER

The following papers read on this motion to annul order and determination

Order to Show Cause . . . 1.

Answering Affidavits . . . 2.

Replying Affidavits

Pleadings, Exhibits, Stipulation

Briefs: Plaintiff's/Petitioner's Defendant's/Respondent's.

Upon the foregoing papers it is ordered that this motion brought on by order to show cause and petition seeking an order of this court annulling the order and determination of the Commissioner of Labor is determined as follows.

The decision sought to be annulled was rendered after hearings conducted by the Department of Labor. Petitioner, as the basis for one of its challenges, asserts that under these circumstances, this proceeding must be, and hereby, is respectfully referred to the Supreme Court, Appellate Division, Second Department pursuant to CPLR 7604(g).

All stays are continued pending the transfer directed herein.

November 28, 1989 /s/ Eli Wager

J.S.C.